Petition

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No.

In The
Supreme Court of the United States

JULY TERM, 1981

ADRIAN LOPEZ,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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July 3, 1981

QUESTIONS PRESENTED

1. Whether an ex-parte administrative subpoena may be used by a law enforcement agency to obtain "cable and pair" information and other technical data from a telephone company without authorization of a Title III order, where the information is sought for the purpose of effectuating a Title III wiretap?

2. Whether reversal is required where the indictment charged a single conspiracy, the proof at trial showed multiple conspiracies; such variance caused prejudice to Petitioner and severance at the close of the government's case was denied?

3. Whether the presence in the jury room during deliberations of a wiretap "logbook", which had been stipulated was not to be made available to the jury, requires reversal on the basis of a violation of Petitioner's constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution?

LIST OF ALL PARTIES

Adrian Lopez

Leonard Duran Enriquez

Barry J. Hoffman

Alfred O. Enriquez

Hal Marion Glotfelter

John Herman Johnson

Virginia Ramirez

United States of America

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Petitioner, Adrian Lopez, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on or about March 24, 1981.

OPINION BELOW

The opinion below, not reported, appears in the Memorandum Opinion in the appendix hereto.

JURISDICTION

The Judgment of the United States Court of Appeals for the Ninth Circuit was set forth in its Memorandum Opinion entered on or about March 24, 1981. A timely petition for rehearing was denied on or about May 4, 1981, and this Petition for a Writ of Certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment provides, in part;

> "SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.* * *"

STATUTORY PROVISIONS INVOLVED

This Petition involves Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510, et seq., the text of which is set forth in the appendix pursuant to Rule 21, Rules of the United States Supreme Court.

STATEMENT OF THE CASE

On August 9, 1978, Petitioner and 21 others were indicted by a Federal Grand Jury and charged with conspiracy to distribute and possess with intent to distribute heroin and cocaine and other controlled substances, in violation of 21 U.S.C. §846, and with a number of counts charging use of the telephone to facilitate a conspiracy to distribute controlled substances, in violation of 21 U.S.C. §843(b). Additionally, one defendant, Leonard Enriquez, was charged with engaging in a continuing

criminal enterprise, in violation of 21 U.S.C. §848. Petitioner was charged with the conspiracy count and three counts of violation of 21 U.S.C. §843(b).

The indictment resulted from a Drug Enforcement Administration (hereinafter "DEA") investigation. Early on in the investigation the DEA served upon Mountain States Telephone & Telegraph Company an ex-parte administrative subpoena for the production of all technical data and specifications necessary for the installation of a wiretap upon the telephone of one of the alleged co-conspirators. Principally, the subpoena sought so-called "cable and pair" information relative to the suspect's telephone.

"Cable and pair" refers to the "trunk cable" through which large numbers of individual telephone lines are run, and the specific "pair" of wires which service a particular telephone subscriber. Without this information, it would be physically impossible to "tap" a given telephone line.

The telephone company complied with the administrative subpoena and provided the information requested in February of 1978. At the time the "cable and pair" information was subpoenaed by the DEA, the purpose for obtaining such information was the ultimate installation of a wiretap.

Several weeks later, after making a number of visits to the "appearance" of the "cable and pair" involved, DEA took the next step in pursuing the wiretap. DEA sought from the District Court an order authorizing the installation of a "pen register" on the same telephone lines for which "cable and pair" information had been subpoenaed. However, the record is absolutely clear that the "cable and pair" information was not obtained solely for the purpose of the pen register installation. The record indicates that, to the contrary, the acquisition of the "cable and pair" information and the subsequent installation of the pen register were both done in the course of and as a part of DEA's plan to effectuate a wiretap.

On March 21, 1978, United States District Court Judge William P. Copple entered an Order authorizing the interception of wire communications transmitted over the telephone of Arnold Enriquez. During this initial wiretap, renewals thereof, and a subsequent wiretap authorization Order entered in April of 1978, approximately 2,000 telephone calls were intercepted and recorded by DEA. Among the telephone conversations recorded were several conversations between Arnold Enriquez and an individual identified only as "Titi." The indictment which was returned on August 8, 1978, charged that Petitioner was the individual known as "Titi."

Of the 22 defendants charged in the indictment, one was never arrested, eleven entered guilty pleas before trial, and the remaining defendants, including Petitioner, were tried before a jury.

Virtually the entirety of the government's case consisted of the tape recordings of intercepted telephone conversations. Approximately 132 of the 2,000 intercepted phone calls were admitted into evidence, with less than ten of the phone calls involving Petitioner.

While the government agents were monitoring the telephone calls, they kept a log which listed chronologically each telephone call intercepted, the time the call started, the time the call ended, whether the call was incoming or outgoing, and if the call was outgoing, the number dialed. The log also contained a summary of the contents of the call intercepted and noted whether the call was minimized. In addition the log contained a letter and a number correlating it to the tape being used to record the call. Finally the log showed whether or not surveillance was being conducted simultaneously with the wire interception.

The logs from each shift were compiled into three books, one for each court authorized interception. Each book contained approximately 100 pages. The government offered the three log books in evidence for the purpose of laying foundation for the introduction of tapes of various telephone calls played for the jury. In offering the logs in evidence the Assistant U.S. Attorney said that he did not intend the logs to go to the jury. The Court admitted the logs with the understanding of all parties that the logs would not go to the jury.

During the deliberations of this case by the jury all parties learned that the logbooks had been given to the jury for consideration.

The log books had been admitted only for the limited purpose and by stipulation were not to go to the jury. Nevertheless, through an error of the Court clerk who was not present on the date of the stipulation, these books were taken into the jury room.

Following an open discussion with the Court concerning this problem, counsel for Petitioner moved for a mistrial. The motion was denied. The Court of Appeals affirmed upon the ground that no prejudice was shown. (See Appendix A).

During trial, counsel also became aware that the DEA had obtained "cable and pair" information on the subject telephones a number of weeks before the Title III authorization order was signed by the District Court. Petitioner moved to suppress the wiretap evidence upon the grounds that such evidence had been obtained in violation of Title III. The ground relied upon by Petitioner was that where the DEA admitted that its ex-parte administrative subpoena of the "cable and pair" information was for the express purpose of ultimately effectuating a Title III wiretap, such use of the subpoena power was not authorized, and constituted a violation of Title III. Petitioner has maintained that under such circumstances the only permissible means by

which the DEA could have obtained such information was pursuant to a valid Title III order.

The District Court disagreed, and denied Petitioner's Motion to Suppress. The District Court made specific findings of fact with respect to its ruling on the Motion to Suppress which are appended hereto in Appendix B.

On appeal, the United States Court of Appeals for the Ninth Circuit, in affirming the order of the District Court, stated:

> "The subpoenaed cable and pair information identified only the cable and particular wires within the cable which service the phones later intercepted pursuant to a court order. The appellants cite no persuasive authority to show that there was 'interception' of a 'wire or oral communication,' as those terms are defined by 18 U.S.C. §2510." (Memorandum Opinion, Appendix A, p. 3).

At the close of the government's case, Petitioner moved for a Judgment of Acquittal upon the ground, among others, that there was a fatal variance between the single conspiracy charged in the indictment and the multiple conspiracies proven at trial. Furthermore, Petitioner moved for a severance at the close of the government's case on the basis of the foregoing variance. Both motions were denied by the District Court and affirmed by the Court of Appeals.

Petitioner was found guilty on the conspiracy count, and two of the three substantive counts with which he was charged. He was found not guilty of the remaining substantive count. He has been sentenced to 10 years imprisonment.

REASONS FOR GRANTING THIS WRIT

I. THE DECISION OF THE COURT BELOW ALLOWS LAW ENFORCEMENT OFFICIALS TO ACQUIRE WIRETAP CAPABILITY AND TO AVOID THE REQUIREMENTS OF TITLE III THROUGH THE USE OF AN EX-PARTE ADMINISTRATIVE SUBPOENA IN VIOLATION OF TITLE III.

A. INTRODUCTION

This case involves a fundamental issue of law regarding the scope and procedural requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510, et seq., (hereinafter referred to as "Title III.") This question, perhaps more so than any previously considered by this Court since the adoption of Title III, requires the Court to balance the stringent procedural requirements set forth in Title III, which are designed to vigorously protect the privacy rights of the individual, against the objective of effective law enforcement.

The facts necessary for the Court's consideration are relatively simple, and with one glaring exception discussed below, are not unlike the facts of a number of other conspiracy cases involving Title III wiretaps which the Court has previously considered.

As has been discussed in the Statement of the Case, the DEA obtained the "cable and pair" information corresponding to one of Petitioner's alleged co-conspirators' telephones by the use of an ex-parte administrative subpoena. Throughout these proceedings, the government has contended that such use of the subpoena power by the DEA was authorized by 21 U.S.C. §876 and §965. The District Court has so found. (See Appendix B) The DEA agents involved have testified that technical information was subpoenaed solely for the purpose of ultimately installing a Title III wiretap.

Counsel for Petitioner has attempted to review each and every reported opinion dealing with the issue presented in this case, and has been unable to find any reported opinion under Title III wherein "cable and pair" information and other technical subscriber data was obtained by the government in a criminal investigation in the manner present here.

The *only* impediment to a law enforcement agency's ability to tap the telephone of *any* individual is the fact that government does not have access to the "cable and pair" information which is known only by the telephone compa-

nies. The government has the necessary devices, the necessary expertise and qualified technicians, as well as the necessary motivation to enable it to tap the phone of any citizen at will. Out of concern for the individual's right of privacy and to curb governmental abuses of the wiretap authority, Congress placed stringent procedural safeguards between law enforcement agencies and their ability to engage in surreptitious electronic surveillance. In light of the fact that "cable and pair" information is the only prerequisite to such surveillance capability which government lacks, it would seem totally inconsistent that Congress intended such information be obtainable by an ex-parte administrative subpoena. Petitioner submits that this procedure violates both the letter and policy of Title III.

B. HISTORY OF TITLE III

The legislative history of Title III is well documented. In Senate Report No. 1097, the Congressional Committee indicated its desire "... to make explicit congressional intent in this area." In its comment to §801 (18 U.S.C. §2510), the Committee described the general congressional intent as follows:

> "[P]aragraph (b) recognizes that to protect the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire or oral communications may be authorized. It also finds that all unauthorized interception of such communications should be prohibited, as well as the use of the contents of unauthorized interception as evidence in courts and administrative hearings." (Senate Report No. 1097, 90th Congr., 2nd Sess., 1968 U.S. Code Congr. & Adm. News, p. 2180.)

The complex procedures which Congress specified that law enforcement officials must follow in obtaining authorization for lawful electronic surveillance form an integrated

"... system of limitations designed to protect privacy ..." *(Id.)*

In discussing one of the safeguards of Title III, the requirement of minimization of interception, a commentator has noted that:

> "That police are not primarily protectors of privacy has been acknowledged in a number of Supreme Court cases. See e.g., *Aguilar v. Texas*, 378 U.S. 108, 112-113 (1964); citing *Giordenello v. United States*, 357 U.S. 480, 486 (1958); citing *Johnson v. United States*, 333 U.S. 10, 14 (1948)". *(26 Stanford Law Review 1411; Minimization of Wire Interception: Pre-search Guidelines and Post-search Remedies, p. 1413, n. 14.)*
>
> "The concept of standing to suppress the product of inadequately minimized wire surveillance supports the notion that the primary thrust of Title III is *regulation of police practices as a means of protecting privacy interests.* Thus a suppression motion is granted not to redress the accused's loss of privacy, but rather to penalize the police and to prevent the occurence of future transgressions." *(Id.* p. 1414, n. 17.) (Emphasis added)

Of particular import to the instant discussion is the fact that a 1970 Amendment to Title III specifically authorizes the court to order, as a part of a Title III wiretap authorization, that a communications common carrier provide the government with "cable and pair" information and other "technical assistance." 18 U.S.C. §2518(4).

Given the highly publicized abuses of the government's ability to engage in covert electronic surveillance which this nation has witnessed in recent years, it is reassuring that this Court has repeatedly granted review of cases which present issues relating to the scope and procedural requirements of Title III, including the following: *United States v. United States District Court*, 407 U.S. 297, 92 S.Ct. 2155, 32 L.Ed. 2d 752 (1972), (a warrant to eavesdrop is required even where domestic security is involved); *Gelbard v. United States*, 408 U.S. 41, 92 S.Ct. 2357, 33 L.Ed.2d 179, (1972), (grand jury witnesses may not be compelled to answer questions based upon

evidence obtained in violation of Title III); *United States v. Chavez*, 416 U.S. 562, 94 S.Ct. 1849, 40 L.Ed.2d 380, (1974), (concerning the procedural requirement that the Attorney General approve a Title III application); *United States v. Giordano*, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341, (1974), (Title III applications must be made by the Attorney General himself or a specially designated Assistant Attorney General); *United States v. Donovan*, 429 U.S. 413, 97 S.Ct. 658, 60 L.Ed.2d 652, (1977), (regarding the identification requirements of Title III); *United States v. New York Telephone Company*, 434 U.S. 159, 98 S.Ct. 364, 54 L.Ed.2d 376, (1977), (District Court can order the telephone company to provide technical assistance to law enforcement officers in connection with pen register installation where probable cause has been shown); *Dalia v. United States*, 441 U.S 238, 99 S.Ct. 1682, (1979), (covert entry to install "bug" may be authorized by District Court in a Title III order); *Smith v. Maryland*, 442 U.S. 755, 99 S.Ct. 2577; 61 L.Ed.2d 220, (1979), (installation of a pen register is not a Fourth Amendment "search"). The issue present in this case requires similar clarification by this Court.

C. SCOPE OF TITLE III.

There appears to be no precedent from which to begin the analysis of whether a subpoena for "cable and pair" information, under circumstances where the intended use of such information is the installation of a Title III wiretap, is within the scope of Title III and therefore violative of it. The statute itself provides some guidance:

> **"§2510. Definitions**
>
> As used in this chapter—
>
> * * *
>
> (4) 'intercept' means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.
>
> * * *

(8) 'contents', when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

* * *

(11) 'aggrieved person' means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed."

"§2515. Prohibition of use as evidence of intercepted wire or oral communications.

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

A review of the case law suggests that perhaps the most effective approach to understanding what *is* covered by Title III is an analysis of what has been found to be *outside* its scope.

Although Senate Report 1097 indicates that "pen registers", (devices which, when attached to individual telephone lines record on a paper tape the telephone numbers which have been dialed by responding to changes in electrical voltage caused by the turning of the telephone dial or the pressing of buttons on a push button telephone), are not within Title III, that question caused some confusion in the lower courts until this Court's ruling in *United States v. New York Telephone Company, supra.* In finding that a "pen register" installation does not require a Title III order, this court stated:

"Title III is concerned only with orders 'authorizing or approving the interception of a wire or oral communication . . .' 18 U.S.C. §2518(1) [18 U.S.C.S. §2518(1)]. Congress defined 'intercept' to mean 'the aural acquisition of the content of any wire or oral communication

> through the use of any electronic, mechanical, or other device.' 18 U.S.C. §2510(4) Pen registers do not 'intercept' because they do not acquire the 'contents' of communications, as that term is defined by 18 U.S.C. §2510(8). [18 U.S.C.S. §2510(8)] Indeed, a law enforcement official could not even determine from the use of a pen register whether a communication existed. They disclose only the telephone numbers that have been dialed — a means of establishing communication." (434 U.S., p. 166)

As the Court noted, a pen register does not "intercept" the "contents" of an "oral or wire communication", and therefore is not within Title III.

Undoubtedly, the use of a pen register device in the investigation of modern-day crime has many uses. Pen registers are often used *at the same time* as an authorized Title III wiretap, [See *United States v. Bynun*, 360 F.Supp. 400, 411-412 (S.D.N.Y. 1973)], and this fact under some circumstances may bring the pen register installation within the purview of Title III due to its nexus with a subsequent wiretap. (See; *United States v. Giordano, supra.)*

In the *New York Telephone* case, this Court indicated that since pen register installations generally are not within Title III the District Court could order the telephone company to provide technical information and assistance to the government in connection with a pen register installation without compliance with Title III. The Court also noted that the 1970 Amendment to Title III, previously discussed, indicated Congressional intent that the courts be empowered to compel, upon proper showing, any assistance necessary to accomplish an electronic interception. (434 U.S. p.176) However, it is important to note that the only issue before the Court was that surrounding the installation of the pen register. There was no subsequent Title III order before the Court for consideration. There was in fact no "interception." This distinction is crucial.

At the District Court level the New York Telephone Company argued that while it agreed that Title III did not strictly apply to pen register installations, nevertheless, if the Court upheld the order directing New York Telephone to provide the F.B.I. with the "cable and pair" information and other technical assistance, the telephone company had effectively provided the F.B.I. with the "*capability* to perform an interception." [*Application of the United States in the Matter Of an Order Authorizing the Use of a Pen Register*, 416 F.Supp. 800, 807. (D.C.S.D.N.Y. 1976)] The telephone company's position was that although the District Court had ordered it to furnish the information and assistance, such an order must necessarily be in the form of a Title III order since "interception capability" was being afforded the F.B.I. *(Id.)* As has been noted, this Court held that the authorization contained in the District Court order was specifically limited to such interference as was necessary to effectuate installation of the pen register only. This Court did not confront the issue of "capability" as raised at the District Court level. Petitioner now asks this Court to consider the issue in the context of a subsequent, but foreseen and intended, wiretap.

In *In The Matter of John Edward Joyce*, 506 F.2d 373, (5th Cir., 1975) the District Court had entered an order ordering Mountain Bell to provide technical assistance and information to enable a DEA agent to install a pen register. The DEA had indicated that it needed two types of assistance: "cable and pair" information and a private leased line. The telephone company refused on the basis of an AT&T policy in existence at the time which forbade telephone company employees from providing such assistance without entry of a prior Title III authorization order. *(Id.*, p. 375) Thereafter, a contempt citation was sought against the phone company and its employee for refusal to comply with the District Court's order. While many of the issues involved in *Joyce* have been finally resolved

by this Court's decision in the *New York Telephone* case, *supra*, one of the District Court's factual findings, undisturbed on appeal, is material to the present case;

> "Notwithstanding the apparent sterility of a pen register implied by this definition, the expert testimony below indicated that once a pen register has been installed, a full wiretap 'interception' of telephone conversations may be accomplished simply by attaching headphones or a tape recorder to the appropriate terminal on the pen register unit." *(Id.*, p. 377, n. 4)

Other forms of surveillance which do not "intercept" do not fall within the purview of Title III: manual telephone traces which do not interfere with or observe the contents of telephonic communication, but merely trace the source of such communication do not constitute "interceptions" proscribed by Title III; [*United States v. Seidlitz*, 589 F.2d 152, (4th Cir., 1978)]; devices which are designed to record the presence of a particular frequency and are thus used to identify the use of so-called "blue boxes" are not within Title III for the same reasoning as has been used in the pen register cases; [*United States v. Bowler*, 561 F.2d 1323, 561 F.2d 1323 (9th Cir., 1977)]; the acquisition by the government of long distance toll records which reveal neither the "contents" nor identity of the parties to any telephonic communication are not covered by Title III, [*United States v. Webster*, 639 F.2d 174, (4th Cir., 1980)]

What these cases have in common is the fact that none of the *acts* involved, i.e., installation of a pen register, performance of a trace, production of toll records, etc., are *intended* to cause, if indeed they are *capable* of causing, an "interception." We may assume from *New York Telephone, supra*, that "capability" to intercept alone does not bring conduct within Title III (although the Court has not specifically ruled on this issue.) Thus, it must be, in part, that it is the *intention* to intercept combined with the *capability* to do so which brings such conduct within the purview of Title III. Such a construction is clearly supported by the law.

18 U.S.C. §2511 sets forth, in part, the following prohibition:

§2511. Interception and disclosure of wire or oral communications prohibited.

"[1] Except as otherwise specifically provided in this chapter any person who —

(a) willfully intercepts, *endeavors to intercept*, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, *endeavors to use* or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication...

* * *

... shall be fined not more than $10,000 or imprisoned not more than 5 years, or both." (Emphasis added.)

We know from the legislative history of Title III that Congress specifically chose to use the word "endeavor" in §2511 and elsewhere with the intention that an "endeavor" which, although directed toward an "interception," falls short of the intended objective, is nevertheless prohibited. In discussing this provision of §2511, Senate Report 1097 states,

"Each prohibition strikes not only at the prohibited action but also at *endeavors* [*Osborn v. United States*, 385 U.S. 323, 385, 87 S.Ct. 429, (1966)] and procurements [*Nye v. Nissen v. United States*, 336 U.S. 613, 69 S.Ct. 766, (1949)]" (Emphasis added)

In *Osborn*, the defendant was indicted for "endeavoring" to bribe a member of the jury panel in a prospective federal criminal trial. The defendant had employed an investigator to act as his agent in consummating the bribe transaction. There were numerous taped telephone conversations between defendant and the investigator involving discussions of the plan to bribe the juror which were admitted in evidence at trial. The defendant argued in this Court that his conviction could not stand because the investigator "never in fact approached" the potential juror.

The Court rejected the defendant's argument and stated;

> "The statute under which the Petitioner was convicted makes an offense of any proscribed *'endeavor'*. And almost 50 years ago this Court pointed out the significance of that word: The word of the section is 'endeavor' and by using it the section got rid of the technicalities which might be urged as besetting the word "attempt,' and *it describes any effort or essay to accomplish the evil purpose that the section was enacted to prevent* . . . The Section . . . is not directed at success in corrupting a juror but at the 'endeavor' to do so. Experimental approaches to the corruption of a juror are the 'endeavor' of the section." Citing *United States v. Russell*, 255 U.S. 138, 143. (*Osborn*, p. 333) (Emphasis added)

That the committee responsible for Title III specifically adopted the foregoing language of *Osborn* as the congressional expression of the intended scope of the term "endeavor" as it is used in Title III, is of primary significance to consideration of the instant matter. To paraphrase the language of *Osborn* as it would apply to Title III; §2511 and its use of the word "endeavor" describes "any *effort* or essay to accomplish the evil purpose" of an unlawful "interception"; experimental approaches to the "interception" of and "oral or wire communication" are the "endeavor" of the section.

In *Jacobson v. Rose*, 592 F.2d 515, (9th Cir., 1978) Nevada Bell was charged with violating 18 U.S.C. §2520 which provides for civil recovery against one who unlawfully "intercepts, discloses, or uses a wire or oral communication." Nevada Bell conceded that it had assisted law enforcement officials in the installation of a wiretap, but sought to preclude civil recovery on the grounds that; (1) it had acted in good faith reliance upon a court order, and (2) that while it had assisted law enforcement officials in preparation of the wiretap, no Nevada Bell employee had actually listened or participated in any "interception" of any conversation.

The Court of Appeals rejected the latter argument, and in finding that Title III liability could be based on pre-interception acts, stated,

> "§2510(4) defines 'intercept' to mean the 'aural acquisition of the contents' of a communication. Nevada Bell contends that because none of its employees actually listened to taped conversations, it has not violated the statute."
>
> "We disagree. In enacting Title III Congress intended to establish sanctions that would deter illegal invasions of privacy through wiretapping. (Citations omitted) When many individuals together take the steps necessary for the recording of telephone conversations, the victim's privacy is violated, regardless of which particular individuals actually listened to the tape." *(Id.* at 522)

The Court cited the decision in *White v. Weiss,* 535 F.2d 1067 (8th Cir., 1976) in support of its ruling.

In *White,* a private detective had furnished wiretap recording equipment to a wife for use by her in the interception of her husband's telephone conversations in an attempt to obtain evidence for use in legal proceedings. While the Court of Appeals' decision deals with the issue of the existence of spousal immunity for such conduct, the opinion also discusses the applicability of Title III proscriptions to one who does not *in fact* participate in an "interception" as that term is defined by Title III. The Court acknowledged that liability may be had under Title III for pre-interception conduct which is intended to result in the unlawful interception of a communication. The Court notes that while the defendant Weiss did not in fact "intercept" any communication himself, he assisted in the necessary pre-interception acts, and intended that those acts result in the interception which was in fact accomplished by his client. The Court stated;

"There would seem to be little question that Weiss knew that Mrs. White intended to wiretap her husband's conversations in a domestic relations controversy."

"The District Court indicated that the language of Title III 'reaches the facts of this case.' We construe this sentence to constitute a finding that the conduct of private detective Weiss fell within the interception language of the act. We agree. Weiss affirmatively participated in the interception by bringing the electronic equipment into the Weiss' home and instructing Mrs. White on how to install the equipment to record her husband's telephone conversations." *(Id.* at 1071)

In *United States v. McIntyre*, 582 F.2d 1221, (9th Cir., 1978) the defendants, police officers, were indicted and convicted of conspiring to violate Title III by "endeavoring" to "bug" the telephone of an assistant chief of police. While the evidence showed that there were discussions among the defendants as to installation of the "bug," and that a "bug" was actually installed, there was no proof that *any* phone call had *actually* been intercepted while the "bug" was in place. The Court quickly dismissed the argument that since no "interception" of an oral communication had been shown to have taken place during the life of the "bug" then the conviction must be overturned. The Court stated:

"The indictment, following the statutory language, charges the defendants with *procuring others to endeavor to intercept* oral communications. Whether, in fact, McGann made or received any telephone calls during the life of the "bug" is immaterial. The evidence at trial prove that defendants did cause (procure) Johnson and Ambos to try (endeavor) to intercept McGann's conversations."*(Id.* at 1226.) (Emphasis added.)

The Court also noted that:

"Congress did not intend to immunize police officers from Title III penalties simply because they are police

officers. The statute is full of references to law enforcement officers as *targets* of the legislation."*(Id.*, at 1225) (Emphasis added)

Thus we see that while Title III proscribes unlawful "interceptions" it is not limited to the classic wiretap case. To violate §2511, no interception need actually have occurred if the defendant has either personally endeavored, or procured another, to intercept a wire or oral communication. Nor, if the defendant is charged with disclosure under §2511 (1) (c) or use under §2511 (1) (d), need he be shown to have been the interceptor. *United States v. Harpel*, 493 F. 2d 346, 351, (10th Cir., 1974).

In this context perhaps review of a hypothetical conviction under §2511 for "endeavoring" to commit an unlawful interception under facts similar to the ones present in this case would be illustrative. Petitioner submits that a conviction under §2511 would be proper upon the following hypothetical facts:

DEA Agent "X" holds a personal grudge against one Mr. "A". Agent "X" proceeds to make contact with a telephone company employee, Mr. "B", who is told by Agent "X" of his desire and plan to "set up" Mr. "A" by the installation of an illegal tap on Mr. "A's" telephone. "X" intimidates "B" into covertly obtaining "cable and pair" information and other technical data from telephone company records regarding the telephone of "A". Although appearing to go along with "X," "B" instead contacts the F.B.I. and informs them of Agent "X's" plan. The F.B.I. requests that "B" meet with "X", and provide him with the technical telephone company data he requested. "B" obtains the information, and meets with "X", at which time he turns over the information requested. Prior to "X's" actual installation of the "tap" the F.B.I. arrests and charges him with "endeavoring" to violate §2511.

Based upon the statutory and case law authority cited herein, a conviction of "X" upon the foregoing hypothetical facts should withstand an attack of the conviction upon the ground that obtaining "cable and pair" information under the circumstances described does not constitute an "endeavor" to violate §2511. Such a conclusion necessarily implies that the act, though prior to an "interception" is nevertheless violative of Title III. This is the position taken by Petitioner herein.

Petitioner contends that there are only three observable differences between the foregoing hypothetical and the facts involved in the instant case: (1) Agent "X", a law enforcement officer, acted in "bad faith" and "willfully" intended to violate the statute; (2) Agent "X" obtained the "cable and pair" information by stealth rather than by subpoena; and (3) there was no "interception" by Agent "X".

The first distinction is spurious because, according to *United States v. McIntyre, supra*, a law enforcement officer's good faith is simply a defense to the intent requirement of §2511. As to the second distinction, if the Court finds that one can violate §2511 by "endeavoring" to intercept in the manner discussed in the hypothetical, then, by definition, *no* authorization short of a Title III order would suffice to justify the acquisition of the information. This would of course only be true, if under the facts of the case, the "cable and pair" information were obtained by an individual whose specific intent was to use the information in connection with a subsequent wiretap, as is the case in the matter before the Court.

As to the final distinction, the cases previously cited clearly indicate that a "successful" interception is not required for a violation of Title III, (see *United States v. McIntyre, supra; Jacobson v. Rose, supra.*) Indeed, with respect to this issue, the facts before the Court are more clearly violative of Title III than the hypothetical facts. There was *in fact* an "interception" of Petitioner's telephone communications. While it is true that there was a

facially valid Title III order entered prior to such interception, a violation of Title III had already taken place and the taint attached to the technical information obtained by subpoena renders the evidence obtained by the subsequent wiretap "fruit of the poisonous tree". The subsequent order cannot possibly be deemed to "purge" conduct which was unlawful at the time it was performed.

D. SUMMARY

The drafters of Title III have clearly indicated that they did not feel secure in entrusting the protection of the individual's right of privacy in his telephonic communications to law enforcement officials. The pre-interception requirements of Title III are stringent and go well beyond the requirement of "reasonableness" necessary under the Fourth Amendment. These safeguards have been vigorously enforced by this Court. Every major city in this country has a police force with the technical knowledge and electronic equipment necessary to effectuate covert electronic surveillance. In virtually all cases, the *only* impediment to the effectuation of an unlawful wiretap is the fact that the necessary technical data (i.e., "cable and pair" information) is in the hands of a telephone company rather than the police.

This Court has held that a pen register installation is generally not within the ambit of Title III; however, Petitioner has attempted to show that where the *object* of the acquisition of "cable and pair" information is the effectuation of a Title III wiretap, the *act* of obtaining that information should be governed by the "endeavor" language of §2511. Evidence obtained thereby must be suppressed. 18 U.S.C. §2515.

Smith v. Maryland, supra, does not compel a different result. *Smith* deals only with the issue of whether a warrantless pen register installation violates the 4th Amendment. This

Court has said that it does not. Neither *Smith* nor *New York Telephone, supra*, deal with the factual setting involved in this case.

Given the obvious importance of the use to which "cable and pair" information and other technical subscriber information may be put, the notion that the executive branch of government can obtain this crucial information by *subpoena* where it intends to effectuate a Title III wiretap is frightening. The potential for abuse is simply too great and Congress' concern over the privacy protections built into Title III should be sufficient to render such a procedure invalid.

2. THE VARIANCE BETWEEN THE ALLEGATION IN THE INDICTMENT THAT THERE EXISTED A SINGLE CONSPIRACY AND THE PROOF AT TRIAL WHICH INDICATED MULTIPLE CONSPIRACIES WAS PREJUDICIAL AND WARRANTED A SEVERANCE AT THE CLOSE OF THE GOVERNMENT'S CASE. THE DECISION BELOW WAS ERRONEOUS AND SHOULD BE REVERSED.

By definition, a conspiracy is an agreement between two or more persons to achieve an unlawful object or to achieve a lawful object by unlawful means. *Krulewitch v. United States*, 336 U.S. 440, 447, n. 4 (1949). While no formal agreement can usually be shown, it is clear that one cannot be found to have agreed with another unless he is aware of the other's existence (and identity) and unless he knows of the other's object. [*Canella v. United States*, 157 F.2d 470 (9th Cir., 1946); *Yates v. United States*, 354 U.S. 298, 329-31, 77 S.Ct. 1064, 1 L.Ed 2d 1356, (1957)]. In general terms, to be convicted of the crime of conspiracy, the evidence must support the inferences of both knowledge of the conspiracy and an intent to further the object of the conspiracy. [See, *United States v. Peoni*, 100 F.2d 401 (2nd Cir., 1938)].

Given that the proper analysis of the scope of a conspiratorial agreement must necessarily turn on proof of knowledge and intent, the courts have developed various models for use in making such an analysis. Very early in the evolution of modern conspiracy law, the so-called "nature of the enterprise" analysis developed. (See *United States v. Bruno*, 105 F.2d 921. (2nd Cir., 1939)) In *Bruno*, the Court of Appeals for the Second Circuit concluded that certain inferences could be drawn from an examination of the "nature of the enterprise" involved in the alleged conspiracy. The "nature of the enterprise" analysis has produced anomalous results. Inferences as to knowledge and intent fail to prove the existence of an agreement, which is necessary to a conspiracy conviction. Thus, the various models which have developed to analyze the "nature of the enterprise" must necessarily proceed from the vantage point of each individual defendant, and must necessarily consider the subjective understanding of each alleged co-conspirator and his relationship to the charged conspiracy. *United States v. Borelli*, 336 F.2d 376, 384. (2nd Cir., 1964)

The model which has had the most frequent application to narcotics conspiracy cases has been the so-called "chain" analysis. The model seeks to explain the "nature of the enterprise" by consideration of the economic realities involved in a chain of distribution of an illegal commodity. The "chain" metaphor has received tacit approval by this Court since its decision in *Blumenthal v. United States*, 322 U.S. 539 (1947).

The "chain" metaphor links the various participants in a narcotics' smuggling operation together based upon the so-called "economic realities" present in such an operation which permits the inference that each "link" has agreed with each and every other "link". However, the single "chain" metaphor fails to accurately represent the schematic of modern-day narcotics conspiracies. Most such conspiracies involve a number of people operating simultaneously at the same functional level, rather than on the basis of a vertical division of labor contemplated by the

single "chain" metaphor. Such horizontal divisions of labor have been referred to as "forks" emanating from the single chain. Bearing in mind that in order to obtain a conviction for a conspiracy, it is necessary to establish that each co-conspirator had in fact *agreed* to participate in the *overall* conspiracy, it must necessarily be shown that each "fork" knew of the existence of and knowingly participated in a conspiracy which involved each and every other "fork" emanating off of the core "chain" of conspirators.

The principles involved here have been discussed at length in *United States v. Baxter*, 492 F.2d 150, (9th Cir., 1972), *cert. dismissed*, 414 U.S. 801 (1973). In *Baxter*, the indictment charged a single conspiracy to import and distribute narcotics involving some 49 defendants. The evidence indicated a central vertical "chain" from which emanated a number of individual retailer "forks". In discussing a claimed fatal variance between the indictment and the proof, and the defendant's claim that a severance should have been granted as to the "fork" retailers, the Court stated:

> "As we view the evidence, the government did not, for the most part, prove direct contact and connivance between the defendant retailers. However, even though the defendant retailers did not directly conspire with each other in this overall undertaking, if each knew or had reason to know, that the other retailers were involved with the Hernandez organization in a broad project for the smuggling, distribution and retail sale of narcotics, and had reason to believe that their own benefits derived from the operation were probably dependent upon the success of the entire venture, the jury could find that each had, in effect, agreed to participate in the overall scheme. (Citations omitted) * * * In applying these principles, however, it is important to avoid confusing the similar purpose of numerous separate adventures of like character, with the single purpose of one overall scheme. (Citations omitted) While the individual defendants may have entered a conspiracy with some of the other indicted co-conspirators, the government had the burden of

connecting each defendant directly or circumstantially with the larger overall scheme." (Citation omitted)

"Thus if, at most, the government proved that a particular defendant purchased narcotics from the Hernandez organization without reason to believe that his ability to do so was because of the existence of an overall conspiracy involving several retailers, the jury would not be warranted in finding that such defendant had thereby participated in an overall conspiracy." *(Id.*, p. 158-159.)

After setting forth the above standards, the *Baxter* court applied them to the individual defendant-appellants. After noting that the government had not produced any *direct* evidence that defendant Baxter knew of the other retailers named in the indictment, the Court concluded that Baxter must have known that an organization the size of the Hernandez organization would have to have a substantial number of retailers such as himself. The Court stated:

"Baxter was shown to be an experienced narcotics operator, and the jury could reasonably find from the clear and unequivocal evidence that Baxter must have known that the Hernandez organization was of such a size and character that it must involve a circle of retailers." *(Id.*, p. 160)

Throughout the *Baxter* opinion, the Court relies upon evidence showing each retailer to be "knowledgeable" and "experienced" in narcotics' transactions, as evidence of such retailers' knowledge that other retailers were involved. The Court also relies on the "knowledgeable retailer" evidence to justify the inference that such a retailer must have realized that his own participation in the conspiracy would substantially contribute to the success of the overall venture. *(Id.)*

Petitioner submits that in the instant case there was no proof, direct or otherwise, indicating that Petitioner knew of or had reason to know of the existence of other retailers

dealing with the Enriquez family. While the existence of a single conspiracy, as charged, is normally a question for the jury, there must be evidence to support such a finding.

Rather than reveal Petitioner to have been a "knowledgeable" and "experienced" retailer, the evidence adduced at trial showed Petitioner to be totally *unknowledgeable* and *unexperienced* in narcotics transactions. At best, the taped telephone conversations reveal discussions between Petitioner and Arnold Enriquez concerning the purchase of narcotics by Petitioner and questioning by Petitioner as to how to "cut" the narcotics. An "experienced" retailer of the kind discussed in *Baxter* would hardly need instruction as to how to "cut" the product. The tapes themselves show Petitioner to be at most a "mere purchaser" of narcotics, and a novice at that.

There is absolutely no evidence whatsoever in the record indicating or giving rise to an inference that Petitioner knew or had reason to know that other retailers were involved, nor that his benefits from dealing with the Enriquez organization, if any, were probably dependent upon the success of the entire venture. (See *Baxter, supra*, p. 159.)

A conviction must be reversed if the variance between the indictment and the proof at trial affects substantial rights of the defendant. *United States v. Friedman*, 593 F.2d 109 (9th Cir., 1979). Such prejudice can be found where the proof at trial is not limited to the conspiracy in which the defendant actually participated. [*Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed 1557, (1946).]

Even if the variance in this case is not deemed fatal, by the close of the government's case the trial court had sufficient evidence to warrant granting of Petitioner's Motion For Severance, and the trial court's failure to sever Petitioner constitutes reversible error.

Federal prosecutors' penchant for drafting enormous drug conspiracy indictments and attempting to prove guilt by association with certain members of the conspiracy has caused some courts concern.

> "While it is obviously impractical and inefficient for the government to try conspiracy cases one defendant at a time, it has become all too common for the government to bring indictments against a dozen or more defendants and endeavor to force as many of them as possible to trial in the same proceeding on the claim of a single conspiracy when the criminal acts could be more reasonably regarded as two or more conspiracies, perhaps with a link at the top." *United States v. Sperling*, 506 F.2d 1323, 1340-41, (2nd Cir., 1974).

Actual confusion on the part of the jury as to the multiple conspiracies shown by the evidence in this case can be inferred. The indictment charged one overall conspiracy to distribute and possess with intent to distribute "heroin, cocaine and other controlled substances." The government put on evidence of transactions involving cocaine, amphetamines, mannite, and marijuana. Generally, each separate "fork" involved different people and different drugs. Petitioner and the other defendants who were tried were found guilty by the jury which returned a special verdict of guilt involving trafficking in cocaine. (See Appendix D.)

On appeal Petitioner raised the variance relating to the proof of multiple conspiracies as well as the sufficiency of the evidence to support a finding of Petitioner's membership in the conspiracy. In ruling on this issue the Court of Appeals stated:

> "The calls in which Lopez participated comprised discussions regarding obtaining, cutting, loaning and selling large quantities of *heroin*. There was, then, sufficient evidence for a trier of fact to conclude . . Lopez

knew [he] was plotting in concert with others to violate the law." (Memorandum Opinion, Appendix A, p.6) (Emphasis added.)

Following Petitioner's Petition for Rehearing, the Court of Appeals entered its Order Amending Memorandum and Denying Petitions for Rehearing in which the confusion caused by the proof of multiple conspiracies once again is manifested. The Order stated:

"Upon due consideration, the panel orders that its Memorandum Decision be corrected to read as follows:

"Substitute 'cocaine' for 'heroin' on p. 5, line 1, of the printed memorandum.

The panel as constituted in the above case has also voted to deny the Petitions for Rehearing." (Appendix C.)

The Court of Appeals' reference to substituting "cocaine" for "heroin" on page 5 of the Memorandum is apparently a typographical error and presumably is meant to refer to such language appearing on p. 6, lines 6-8. Since the jury found Petitioner not guilty of any offense involving heroin, the multiple conspiracy confusion in this case has made unobstructed review by an appellate court difficult, if not impossible.

Based upon the variance and the failure of the trial court to grant a severance at the close of the government's case, Petitioner submits that review by this Court of the opinion of the Ninth Circuit Court of Appeals affirming the judgment of the District Court is necessary to put an end to the "all too common" practice employed by the government in narcotics conspiracy cases.

3. THE JURY'S REVIEW OF PREJUDICIAL EXTRINSIC MATERIAL DURING ITS DELIBERATIONS REQUIRES REVERSAL.

In *Turner v. Louisiana*, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965) this Court referred to the 6th Amendment right in considering the impact of outside influence on a jury.

"In essence, the right to a jury trial guarantees to the criminally accused a fair trail by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." (Citations omitted)

"A fair trial in a fair tribunal is a basic requirement of due process. (Citations omitted) In the ultimate analysis, only the juror can strip a man of his liberty or his life. * * * His verdict must be based upon the evidence developed at trial. (Citation omitted) This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written in our laws as early as 1907 by Chief Justice Marshall in 1 *Burr's Trial*, at 416 . . " (379 U.S., p. 471-2).

A fundamental axiom of our jurisprudence is that the sanctity of the jury room must remain inviolate. The right to a trial by jury becomes more fragile as the leeway for an improperly influenced verdict is permitted to widen.

In *Turner, supra*, the Court stated:

"The requirement that a juror's verdict 'must be based upon evidence developed at trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of a trial by jury. 'The trial is an essential instrumentality — an appendage — of the Court, the body ordained to pass upon the guilt or innocence. Exercise of common informed judgment by its members is an essential to the proper enforcement of law." (Citations omitted)

"Mr. Justice Holmes stated no more than a truism when he observed that 'any judge who has sat with jurors knows that in spite of the forums they are extremely likely to be impregnated by the enviro ing atmosphere."*(Id.)*

Turner further stated that constitutional requirements mandate that at the very least the evidence developed against the defendant shall come from the witness stand in a public

courtroom where there is a full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel. Petitioner submits that that did not happen here.

In this particular case the jury, through an error not attributable to the defendant, received extrinsic prejudicial material during its deliberations, the most crucial point in the proceeding.

Eighty-seven years ago this Court held that it was reversible error for the trial court to allow an entire book to go into the jury room without sealing off pages not admitted in evidence, even though it was not shown that any of the jurors actually read the inadmissible pages. [*Bates v. Preble*, 151 U.S. 149 (1893).]

Therefore, Petitioner contends the District Court erred when it failed to grant his Motion for Mistrial. Such error precluded him from confronting and cross-examining this extremely prejudicial material. He was further prejudiced in that he was denied due process of law as guaranteed by the Fourteenth Amendment as well as an impartial jury guaranteed by the Sixth Amendment of the United States Constitution. Therefore, it is respectfully requested that this Court reverse and remand this case for a new trial.

CONCLUSION.

For the foregoing reasons, Petitioner respectfully requests that this Court issue the herein sought Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

MAHONEY, LEHMAN, ROOD, REMPE, SPEARS & VAUGHN, P.C.

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. LEONARD DURAN ENRIQUEZ, ET AL., *Defendants-Appellants.*	Nos. 79-1714; 79-1715; 79-1716; 79-1717; 79-1718; 79-1719; 79-1722 D.C. # CR 78-287 PHX CAM MEMORANDUM

Appeal from the United States District Court
for the District of Arizona
C. A. Muecke, District Judge, Presiding
Argued and submitted November 10, 1980

Before: GOODWIN and SCHROEDER, Circuit Judges and JAMESON*, District Court Judge

This is a drug conspiracy prosecution involving seven out of an original 22 defendants. The appeals arise out of convictions of conspiracy to distribute and possession with intent to distribute heroin and cocaine in violation of 21 U.S.C. §846 and use of the telephone to facilitate a conspiracy to distribute controlled substances in violation of 21 U.S.C. §843(b). One of the defendants, Leonard Enriquez, was also convicted of engaging in a continuing criminal enterprise in violation of 21 U.S.C. §848. Much of the evidence adduced against the appellants was obtained as the result of three separate wiretap authorizations over the course of several months. A number of issues are presented for review.

*William J. Jameson, Senior District Judge, District of Montana, sitting by designation.

I. *The Wiretaps*

Leonard Enriquez argues that an adequate showing of the necessity for the wiretaps was not made as required by 18 U.S.C. §2518(1)(c). In a similar vein, appellant Glotfelter challenges the necessity of the second and third wiretaps. In this case, each affidavit contained statements relating in detail why normal investigative procedures were inadequate, not reasonably likely to succeed, or too dangerous. Each incorporated the information contained in the prior applications and provided a further update on the investigation. In addition, the authorizing judge required the government to provide regular reports regarding the progress made in the wiretap investigation. The authorizing judge has considerable discretion to determine whether an adequate showing of necessity has been made. *United States v. Martin*, 599 F.2d 880, 886 (9th Cir.), *cert. denied sub nom. Andrews v. United States*, 441 U.S. 962 (1979). We find no abuse of discretion here. *See United States v. Bailey*, 607 F.2d 237 (9th Cir. 1979), *cert. denied sub nom. Whitney v. United States*, 445 U.S. 934 (1980).

Error is also claimed in the failure to name certain co-defendants as target defendants in subsequent wiretap applications. An agency must name those individuals it has probable cause to believe will be probable conversers engaged in the criminal activity under investigation. *United States v. Donovan*, 429 U.S. 413, 97 S.Ct. 658 (1977). Both Virginia Ramirez and Alfred Enriquez fall into that class of persons "as yet unknown" for wiretap authorization purposes, however, and therefore they did not have to be named. *United States v. Kahn*, 415 U.S. 143, 94 S.Ct. 977 (1974).

Leonard Enriquez' argument that he was entitled to a hearing regarding whether the affidavits were intentionally or recklessly false is without merit. The appellants' affidavits are substantially comprised of personal denials of the truth of statements made by agent Garcia in the wiretap affidavits. In addition, the oral offers of proof submitted to the district court are cumulative challenges to the govern-

ment's exhaustion of other investigative possibilities. These affidavits and offers of proof do not make the requisite showing that agent Garcia included deliberate falsehoods or statements in reckless disregard for the truth in her affidavit. No hearing was required. *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674 (1978); *United States v. Young Buffalo*, 591 F.2d 506 (9th Cir.), *cert. denied*, 441 U.S. 950 (1979).

The appellants' arguments regarding use of composite tapes prepared from duplicate original tapes must be rejected. The district court found the chain of custody showed no alterations or deletions were made to the original, the duplicate original, or composite tapes and, in addition, the sealed originals were available to the defendants.

We reject the appellants' contentions that the wiretapped phone conversations should have been suppressed pursuant to 18 U.S.C. §2515 because cable and pair information was obtained by subpoena prior to the wiretap order. The subpoenaed cable and pair information identified only the cable and particular wires within the cable which serviced the phones later intercepted pursuant to court order. The appellants cite no persuasive authority to show there was an "interception" of a "wire or oral communication," as those terms are defined by 18 U.S.C. §2510.

Assertions that the wiretap order was signed three days before the affidavit supporting it are without foundation. The originals on file with the district court indicate both the affidavit and wiretap order were signed on May 2, 1978.

II. *Motions for Severance and Mistrial*

Lopez argues the evidence demonstrated the existence of multiple conspiracies, rather than a single conspiracy, and therefore the trial court should have granted him a severance because of the prejudicial variance between the indictment and the proof. In conspiracy cases, "the existence of a unitary scheme matching that charged in the indictment is a question for the jury." *United States v. Lutz*, 621 F.2d 940, 943 (9th Cir.), *cert. denied sub nom. White v.*

United States, 101 S.Ct. 160 (1980). Viewing the evidence in the light most favorable to the government, we find the evidence was sufficient to create a jury question on the existence of a single conspiracy. *United States v. Thomas*, 586 F.2d 123, 132 (9th Cir. 1978). *See also United States v. Kenny*, No. 79-1544 (9th Cir. decided Jan. 23, 1981).

Lopez and Hoffman also claim the trial court should have severed their trials because there was more evidence introduced against other defendants. Generally co-defendants jointly charged are to be jointly tried and a motion for severance is addressed to the discretion of the trial court. *United States v. Gay*, 567 F.2d 916 (9th Cir.), *cert. denied*, 435 U.S. 999 (1978). *See also United States v. Kenny*, No. 79-1544 slip op. at 57-58 (9th Cir. decided Jan. 23, 1981). There was no abuse of discretion.

Hoffman claims further error in the trial judge's refusal to grant him a severance because other co-defendants would testify for him if he were tried separately. The evidence against Hoffman revealed his association as a supplier with two of the leading members of the conspiracy, Leonard Enriquez and John Lange. The defendants Hoffman indicated would exculpate him were Ramirez, Glotfelter and Lopez who would testify, in essence, that they did not know Hoffman. The government did not have to prove Hoffman knew every member of the conspiracy and it did not try. This testimony would have no exculpatory significance. *See United States v. Vigil*, 561 F.2d 1316, 1317 (9th Cir. 1977). Since Hoffman fails to demonstrate any prejudice or unusual circumstances which would compel the trial court to exercise its discretion to sever, there was no abuse of discretion. *See United States v. Ellsworth*, 481 F.2d 864, 870 (9th Cir. 1973), *cert. denied*, 414 U.S. 1041 (1974).

Appellant Lopez argues Leonard Enriquez' brief outburst and removal from the courtroom were grounds for a mistrial. The trial court promptly instructed the jury to disregard Enriquez' outburst and any statements made with

respect to the episode and admonished the jury to decide the case only upon the evidence presented. On balance we cannot hold that there was abuse of discretion in the refusal to grant a mistrial. *See United States v. Gardner*, 611 F.2d 770, 776-77 (9th Cir. 1980), *United States v. Clardy*, 540 F.2d 439, 444-45 (9th Cir.), *cert. denied sub nom. Tucker v. United States*, 429 U.S. 963 (1976). *See also United States v. Marshall*, 458 F.2d 446, 451 (2d Cir. 1972).

III. *Membership in the Conspiracy*

Virginia Ramirez and Adrian Lopez challenge the sufficiency of the evidence to support their conspiracy convictions. On appeal, this Court must view the evidence in the light most favorable to the prosecution and determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Kenny*, No. 79-1544 slip op. at 46 (9th Cir. decided Jan. 23, 1981); *United States v. Bailey*, 607 F.2d 237, 243 (9th Cir. 1979), *cert. denied sub nom. Whitney v. United States*, 445 U.S. 934 (1980). The telephone calls in which the defendant Ramirez participated constituted the government's direct proof of her participation in the conspiracy. Other co-conspirators' statements also indicated her participation. The calls in which Lopez participated comprised discussions regarding obtaining, cutting, loaning and selling large quantities of heroin. There was, then, sufficient evidence for a trier of fact to conclude Ramirez and Lopez knew they were plotting in concert with others to violate the law. *See United States v. Thomas*, 586 F.2d 123, 132 (9th Cir. 1978); *United States v. Kearney*, 560 F.2d 1358, 1362 (9th Cir.), *cert. denied*, 434 U.S. 971 (1977).

IV. *Ineffective Assistance of Counsel*

Appellant Hoffman argues that cumulative errors established the incompetency of his defense counsel and prejudiced his defense. Several of the claimed errors rest

upon factual allegations outside the trial court record, however, and Hoffman has an adequate remedy provided by 28 U.S.C. §2255. *United States v. Lara-Hernandez*, 588 F.2d 272, 275 (9th Cir. 1978).

V. *Misconduct by the Trial Court*

Appellants Hoffman and Lopez allege the trial court improperly limited cross-examination of government witnesses and overstepped the bounds of neutrality and impartiality by making objections, assisting in questioning and rehabilitating witnesses, and failing to maintain composure. The proper extent of cross-examination generally lies within the discretion of the trial court. *United States v. Kizer*, 569 F.2d 504 (9th Cir.), *cert. denied*, 435 U.S. 976 (1978). The record reveals the court primarily limited cross-examination when the questions on cross exceeded the scope of direct examination. This did not constitute an abuse of discretion. *See United States v. Bagsby*, 489 F.2d 725, 727 (9th Cir. 1973). We find no merit to the other claims of judicial misconduct. A trial judge must, of course, constantly be aware of his sensitive role in a jury trial and avoid even the appearance of advocacy or partiality. We find the conduct complained of here was not at any single point or cumulatively so prejudicial as to deprive the defendants of a fair trial. *See United States v. Eldred* 588 F.2d 746 (9th Cir. 1978).

VI. *Prosecutor Misconduct*

Appellants Johnson and Leonard Enriquez plead the prosecutor committed misconduct in his closing argument to the jury by attacking defense counsel, vouching for witness credibility, and commenting on defendant Enriquez' failure to testify. Appellants' arguments about attacks upon defense counsel are without merit. Any comment relating to Leonard Enriquez' failure to testify was an indirect and inadvertent remark which was quickly corrected. *See United States v. Tierney*, 424 F.2d 643, 647 (9th Cir.), *cert. denied*, 400 U.S. 850, 91 S.Ct. 53 (1970). As to the allegations that the prosecutor vouched for government

witnesses' credibility, we agree prosecutors should refrain from implying that the government has taken steps to assure the veracity of its witnesses. *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1980). In this case, however, defendants' allegations must be rejected when viewed in the context of defense counsel's closing arguments that the government witnesses were liars. *United States v. Potter*, 616 F.2d 384, 392-93 (9th Cir. 1979), *cert. denied*, 101 S.Ct. 101 (1980). The trial judge admonished the jury that statements and arguments of counsel were not evidence.

VII. *Logbooks Into the Jury Room*

During the jury deliberations, a logbook which was not admitted into evidence was inadvertently allowed into the jury room. The jurors made some use of the logbook, as evidenced by their request to rehear several telephone conversations by date and number. When the error was discovered, the trial court conducted a short inquiry to determine the severity of the breach by asking the jury foreman specifically and the rest of the jury collectively to what extent they saw or discussed the information in the inadmissible logbooks. *United States v. Vasquez*, 597 F.2d 192, 194 (9th Cir. 1979). In light of the short time the logbook (only a part of a mass of evidence) was present in the jury room and the foreman's assertion and jury's agreement that only the dates of phone calls were looked up in the logbook, we agree with the district court's conclusion that the error, if any, was harmless. Had defense counsel wished a more extensive questioning of the jury, counsel should have requested a more extensive inquiry before the verdicts were returned.

VIII. *Punishment for Exercising Right to Trial*

Appellants allege they were punished for exercising their sixth amendment right to a jury trial because the sentences imposed upon them were disproportionate to the sentences imposed upon other co-defendants who pled guilty, without an adequate explanation in the record for the sentencing disparity. Most of the defendants who chose to forego trial

entered guilty pleas to lesser charges. One defendant, Arnold Enriquez, who pled guilty to the actual conspiracy charge (Count 1) and a facilitation charge, received a sentence and fine comparable to the sentences and fines imposed upon the defendants who were convicted of the conspiracy charge (Count 1) and numerous facilitation charges. There is no substantial disparity in the sentencing and the appellants' contention is without merit.

Appellant Hoffman further submits that his sentence is excessive. The district court has wide discretion in determining what sentence to impose and, as long as the sentence is within statutory limits, it will not be reviewed on appeal. *United States v. Wylie*, 625 F.2d 1371, 1379 (9th Cir. 1980).

IX. *Other Contentions*

Defendants Hoffman and Alfred Enriquez allege it was error to allow one of the DEA agents to identify the defendants' voices because he had never heard their voices in person or on voice exemplars. Defendant Alfred Enriquez contends further that the government failed to show he was the same Alfred Enriquez named in the indictment. As to the identity of the speakers in the telephone conversations, there was sufficient circumstantial evidence for the jury to determine that they were, indeed, defendants' voices. The trial court did not abuse its discretion in admitting this testimony. *Carbo v. United States*, 314 F.2d 718, 743 (9th Cir. 1963), *cert. denied sub nom. Palermo v. United States*, 377 U.S. 953 (1964). Similarly a prima facie case regarding the identity of Alfred Enriquez was made so the jury could conclude the person named in the indictment and the defendant were one and the same.

The trial court's refusal to admit the DEA (6) report was not error. In the trial court, defendant Hoffman's attorney attempted to have the report admitted into evidence under several theories, all of which were properly rejected by the trial court. On appeal, Hoffman alleges additional theories

for admission under the evidence rules. There is no plain error which would warrant reversal in this case. *See United States v. Sims*, 617 F.2d 1371 (9th Cir. 1980); *United States v. Lara-Hernandez*, 588 F.2d 272 (9th Cir. 1978).

Appellant Leonard Enriquez provides no basis for his contention that 21 U.S.C. §843(b) is an implicit exception to the definition of a continuing criminal enterprise in 21 U.S.C. §848(b). His contentions that the sentence imposed upon him was improper because the trial court specified parole eligibility which is not allowed for a conviction of 21 U.S.C. §848 will not be entertained on appeal. That matter is more properly presented to the district court by a rule 35 motion to correct an illegal sentence.

Finally, Enriquez' conviction on Count 29 (21 U.S.C. §843(b)) must be upheld. His conviction on Count 1 (21 U.S.C. §846) established his membership in the conspiracy. Gary Parra's acquittal on Count 29 resulted from insufficient evidence, which tended to show only that Parra was a mere customer or involved in another drug conspiracy not charged in the indictment. *See United States v. Martin*, 599 F.2d 880 (9th Cir.), *cert. denied sum nom. Andrews v. United States*, 441 U.S. 962 (1979). That provides no basis for Enriquez' acquittal on the facilitation charge; his participation in the conspiracy and knowing use of the telephone to facilitate that conspiracy is punishable under 21 U.S.C. §843(b). *United States v. Turner*, 528 F.2d 143, 165 (9th Cir.), *cert. denied sub nom. Hackett v. United States*, 429 U.S. 837 (1976). *See also United States v. Pierorazio*, 578 F.2d 48 (3d Cir.), *cert. denied*, 439 U.S. 981 (1978).

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, *Plaintiff,* v. LEONARD DURAN ENRIQUEZ, ET AL., *Defendants.*	No. CR 78-287 PHX - CAM ORDER

Defendants object to the Government's intent to use a composite tape recording (Government's Exhibit 43) made from the "duplicate original" tape recordings (which were not sealed pursuant to court order as were the "original" tape recordings) and move to suppress admission of all telephone conversations intercepted in relation to this case, and to dismiss the indictment, because of the Drug Enforcement Administration's use of administrative subpoenas to obtain documents [Government's Exhibits 135(a) and 135(b)] from the telephone company prior to the entry of the Court's orders permitting wiretaps, which orders were issued pursuant to 18 U.S.C. §§2510 et seq. The documents in question contain "cable and pair" information which is necessary to institute the types of wiretaps used in this case. The Court has heard the testimony of DEA Agents Rabourn and Garia at the hearing on these issues and a trial, and has heard oral argument and received memoranda from all parties.

Based on testimony and the stipulation of the parties related to the issues decided herein, and argument of counsel, the Court finds as follows:

(1) The Drug Enforcement Administration obtained the documents in question pursuant to subpoenas (Government's Exhibits 1 and 2 for purposes of this hearing) issued by the DEA.

(2) There is no evidence that federal agents intercepted wire or oral communications (as defined by 18 U.S.C. §§2510 et seq.) prior to issuance of the Court's orders in this matter.

(3) The DEA had need to obtain such information prior to obtaining the Court's orders in order to ascertain the procedure to use in setting up the equipment for the hookup to the telephones to be tapped. Agent Rabourn has testified, without contradiction, that he visited the sites of the cable outlets to see where the DEA could set up surveillance posts and to see what equipment would be necessary to actually tap the telephones in question, but that he did not touch any cable outlets or intercept any communication or show any intent to do so prior to issuance of Court order permitting such interception.

(4) The telephone company records were not public records but were business records within the meaning of the Federal Rules of Evidence.

(5) There has been no showing that the subpoenas in question were issued in a manner contrary to law.

(6) The fact that the telephone company has no need for cable and pair information except for maintainance purposes (as indicated by the parties' stipulation) is not dispositive of whether the Drug Enforcement Administration should have had access to the information as reflected by DEA Special Agent Rabourn's testimony during trial that he went to the "appearance" locations in order to see what might need to be done to facilitate the wiretaps. In addition, cable and pair information is necessary to installation of a pen register, which installation would not violate the dictates of 18 U.S.C. §2510 et seq.

(7) The DEA agents participating in this case at all times maintained proper custody and control of the original tape recordings in accordance with the orders of the Honorable Wm. P. Copple, U.S. District Judge, District of Arizona, and of the duplicate original tape recordings from which the composite tape (Government's Exhibit 43) was made. The DEA agent in charge of making the composite which is offered in evidence at trial, was competent and knowledgeable to the extent necessary to make such composite tape recording. The chain of custody established by the agents who testified established that no alterations or deletions were made to the original, duplicate original, or composite tapes.

(8) DEA Special Agent Rabourn took no notes other than those contained on Government's Exhibits 135(a) and 135(b), and in addition, first saw the cable and pair binding posts and exposed wires after entry of the court order authorizing wire interception.

For purposes of these motions, the court will assume that all defendants (as has been the procedure throughout this trial) have joined in these motions and that all claims are based, jointly and in the alternative, on the First and Fourth Amendments; 18 U.S.C. §§2510, et seq., and particularly §2515; and 47 U.S.C. §605. Based on the foregoing and the Court's findings of fact, the Court concludes as follows:

(1) The Drug Enforcement Administration is authorized by law to issue subpoenas such as those issued in the instant case, including Government's Exhibits 1 and 2, for the purposes of this hearing. 21 U.S.C. §§876, 965; 28 C.F.R. §§.100 and .104(3)(a).

(2) There is no legal distinction between the records sought and obtained in this matter and the toll records obtained, *U.S. v. Baxter, et al.*, 492 F.2d 150, 165-67 (9th Cir. 1973), cert. denied 94 S.Ct. 1945 (1974); and *U.S. v. Fithi-*

an, 452 F.2d 505, 506 (9th Cir. 1971) despite the fact that the records obtained in this instance [Government's Exhibits 135(a) and 135(b)] contained "cable and pair" information.

(3) The Fourth Amendment does not preclude the obtaining of Government's Exhibits 135(a) and 135(b) for the reason that the right of privacy that is the basis for defendants' argument attaches to the telephone conversations themselves and not to the information related to the telephone company records. See *U.S. v. Fithian, supra; U.S. v. Baxter, et al.*, 492 F.2d 150, 165-167 (9th Cir. 1973), *cert. dismissed* 94 S.Ct. 16, *rehearing denied* (1973), *cert. denied* 94 S.Ct. 1945 (1974).

(4) Obtaining Exhibits 135(a) and 135(b) prior to obtaining court orders did not violate the provisions of 18 U.S.C. §§2510, et seq., and particularly §2515. 18 U.S.C. §2515 proscribes the use, as evidence of the contents of *intercepted* wire or oral communications. 18 U.S.C. §2510(4) defines "Intercept" as meaning "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.", or the attempted aural acquisition of such contents by such means. *U.S. v. McIntyre*, 582 F.2d 1221 (1978). There was no attempted interception prior to entry of the Court's order in this case.

With respect to the acquisition of Government's Exhibits 135(a) and 135(b), Defendant Lopez's motion, in which all other defendants have joined, must fail for two reasons:

(a) First, the evidence was not acquired "aurally" as required by §2510(4). To acquire "aurally" means to acquire by hearing. *Webster's Third New International Dictionary* at 144. As previously noted, the exhibits were documents given over to the DEA agent by an employee of the telephone company.

(b) Second, the documents [Exhibits 135(a) and 135(b)] were not acquired through the use of any electronic, mechanical, or other device within the meaning of the Statute.

(5) The Government's actions in obtaining Government Exhibits 135(a) and 135(b) do not violate the provisions of 47 U.S.C. §605. See *U.S. v. Baxter, supra.*

(6) *White v. Weiss,* 535 F.2d 1067 (8th Cir. 1976), is not dispositive of this case. In *White,* a wire interception was accomplished illegally. On the facts before the Court at this time, defendants base their motions solely on the Government's actions in getting cable and pair information from the telephone company by subpoena prior to obtaining a court order to institute the wiretap. No conversations were intercepted prior to the entry of the Court's order in the case before the Court at this time.

(7) *In re Application of the United States,* 427 F.2d 639 (9th Cir. 1970) stands for the proposition that prior to enactment of 18 U.S.C. §2518(4), the United States could not force the telephone company to cooperate in instituting wiretaps. The case does not stand for the proposition that the telephone companies could not cooperate if they chose to do so. The fact that §2518(4) requires the telephone company to provide court ordered assistance does not mutually exclude the possibility of the telephone company assisting the Government voluntarily. The only difference is that if the telephone company assists the Government without benefit of a court order, it runs the risk of being civilly or criminally liable for its actions in the event that it aids and abets an unlawful wiretap.

(8) The Court finds that the Government's Memorandum of Proof of Foundation to Support Admissibility of Tape Recordings from Electronic Surveillance filed with the Court on June 19, 1979, is well taken and hereby adopts and incorporates such memorandum into this order, together with other statements made by counsel and testimony of witnesses from the record of the trial and

hearings in this matter. In any event, the broader requirements of *U.S. v. Scully*, 546 F.2d 255 (9th Cir. 1976) have certainly been met in this case and the *prima facie* foundation requirements of *Carbo v. U.S.*, 314 F.2d 718, 743 (9th Cir. 1963), cert. denied, 377 U.S. 953 (1964) have also been met.

(9) Counsel have also objected to the admission of the recordings that have been intercepted in this case on the grounds that the originals of these recordings which have been under court seal were not used in the preparation of the composite recordings which the Government wishes to present to the jury as an exhibit. They cite Title 18, §2518(8)(a) in support of their view which in pertinent part reads as follows:

> The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

The Court finds that Plaintiff United States Government has given a satisfactory explanation for the absence of the use of the original recordings that are still under court seal by stating that they wish to preserve the integrity of these tapes by maintaining them under seal so that they may at any point that the original duplicates are challenged be compared with the originals still under seal and the Court finds this to be a satisfactory explanation. In any event, the Court finds that if there is error in the Government's use of the duplicate originals that it is harmless error since the originals under seal are available to counsel for any appropriate purpose they wish to make of them pursuant to court order for comparison purposes. In addition, the Court does

not wish at this time to delay the trial for an excessive period of time which might be required if the Government were ordered to make a new composite tape exhibit from the original tapes under seal.

(10) Finally, it appears to the Court that in light of the extensive cooperation afforded defense counsel by the United States Attorney, the motion made with respect to making of the composite tape from the original tapes could have been brought before trial as required by 18 U.S.C. §2518 (10) (a).

Therefore,

IT IS ORDERED that defendants' motions to suppress and motions to dismiss based on the Government's means of obtaining exhibits 135(a) and 135(b) are denied, and objections to the admissibility of Government's Exhibit 43 is overruled.

DATED this 20th day of June, 1979, at Phoenix, Arizona.

/s/ C. A. MUECKE

C. A. MUECKE
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. LEONARD DURAN ENRIQUEZ, ET AL., *Defendants-Appellants.*	Nos. 79-1714-79-1719; 79-1722 ORDER AMENDING MEMORANDUM AND DENYING PETITIONS FOR REHEARING

Before: GOODWIN AND SCHROEDER, Circuit Judges and JAMESON*, District Court Judge

Upon due consideration, the panel orders that its memorandum decision be corrected to read as follows:

Substitute "cocaine" for "heroin" on page 5, line 1, of the printed memorandum.

The panel as constituted in the above case has also voted to deny the petitions for rehearing.

*Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

APPENDIX D

IN THE UNITED STATES DISTRICT FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, *Plaintiff,* v. LEONARD DURAN ENRIQUEZ, ET AL., *Defendants.*	No. CR-78-287 PHX CAM SPECIAL VERDICT

We, the Jury, do hereby find that the defendants, Leonard Duran Enriquez; Barry J. Hoffman; Alfred O. Enriquez; Gary Parra; Adrian Lopez, aka TiTi; Hal Marion Glotfelter; John Herman Johnson; Virginia Ramirez, did knowingly and intentionally distribute and possess with intent to distribute cocaine.

DATED: Aug. 24, 1979. RONALD V. ROMICK, Foreman

APPENDIX E

Wire Interception and Interception of Oral Communications—
18 USC §§2510-2520 (Title III)

§2510. Definitions
§2511. Interception and disclosure of wire or oral communications prohibited
§2512. Manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices prohibited.
§2513. Confiscation of wire or oral communication intercepting devices.
§2515. Prohibition of use as evidence of intercepted wire or oral communications.
§2516. Authorization for interception of wire or oral communications.
§2517. Authorization for disclosure and use of intercepted wire or oral communications.
§2518. Procedure for interception of wire or oral communications.
§2519. Reports concerning intercepted wire or oral communications.
§2520. Recovery of civil damages authorized.

§2510. Definitions

As used in this chapter—

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authroized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code; and

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

Added Pub.L.90-351, Title III, §802, June 19, 1968, 82 Stat. 212.

§2511. Interception and disclosure of wire or oral communications prohibited.

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such persons knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2)(a)(i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal coure of his employment while engaged in any

activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided*, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) It shall not be unlawful under this chapter for an officer, employee, or agent of any communication common carrier to provide information, facilities, or technical assistance to an investigative or law enforcement officer who, pursuant to this chapter, is authorized to intercept a wire or oral communication.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for th purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measure as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

Added Pub.L. 90-351, Title III, §802, June 19, 1968, 82 Stat. 213, and amended Pub.L. 91-358, Title II, §211(a), July 29, 1970, 84 Stat. 654.

§2512. Manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices prohibited

(1) Except as otherwise specifically provided in this chapter, any person who willfully—

(a) sends through the mail, or sends or carries in interstate or foreign commerce, any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications;

(b) manufactures, assembles, possesses, or sells any electronic, mechanical or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce; or

(c) places in any newspaper, magazine, handbill, or other publication any advertisement of—

(i) any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications; or

(ii) any other electronic, mechanical, or other device, where such advertisement promotes the use of such device for the purpose of the surreptitious interception of wire or oral communications, knowing or having reason to know that such advertisement will be sent through the mail or transported in interstate or foreign commerce,

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) It shall not be unlawful under this section for—

(a) a communications common carrier or an officer, agent, or employee of, or a person under contract with, a communications common carrier, in the normal course of the communications common carrier's business, or

(b) an officer, agent, or employee of, or a person under contract with, the United States, a State, or a political subdivision thereof, in the normal course of the activities of the United States, a State, or a political subdivision thereof, to send through the mail, send or carry in interstate or foreign commerce, or manufacture, assemble, possess, or sell any electronic, mechanical, or other device

knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications.

Added Pub.L.90-351,Title III, §802, June 19, 1968, 82 Stat. 214.

§2513. Confiscation of wire or oral communication intercepting devices

Any electronic, mechanical, or other device used, sent, carried, manufactured, assembled, possessed, sold, or advertised in violation of section 2511 or section 2512 of this chapter may be seized and forfeited to the United States. All provisions of law relating to (1) the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violations of the customs laws contained in title 19 of the United States Code, (2) the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof, (3) the remission or mitigation of such forfeiture, (4) the compromise of claims, and (5) the award of compensation to informers in respect of such forfeitures, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions of this section; except that such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the provisions of the customs laws contained in title 19 of the United States Code shall be performed with respect to seizure and forfeiture of electronic, mechanical, or other intercepting devices under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

Added Pub.L. 90-351, Title III, §802, June 19, 1968, 82 Stat. 215.

§2514. Repealed. Pub.L. 91-452, Title II, §227(a), Oct. 15, 1970, 84 Stat. 930.

Effective Date of Repeal

Sections 227(a), 260 of Pub.L. 91-452 provided for repeal of this section effective four years following sixtieth day after date of enactment of Pub.L. 91-452, which was approved Oct. 15, 1970, such repeal not affecting any immunity to which any individual was entitled under this section by reason of any testimony or other information given before such date.

§2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Added Pub.L. 90-351, Title III, §802, June 19, 1968, 82 Stat. 216.

§2516. Authorization for interception of wire or oral communications

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h), or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), sections 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 (violations with respect to congressional assassination, kidnapping and assault);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State Statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

Added Pub.L. 90-351, Title III, §802, June 19, 1968, 82 Stat. 216, and amended Pub.L. 91-452, Title VIII, §810, Title IX, §902(a), Title XI, §1103, Oct. 15, 1970, 84 Stat. 940, 947, 959; Pub. L. 91-644, Title IV, §16, Jan. 2, 1971, 84 Stat. 1891.

§2517. Authorization for disclosure and use of intercepted wire or oral communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom

may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

Added Pub.L. 90-351, Title III, §802, June 19, 1968, 82 Stat. 217 and amended Pub.L. 91-452, Title IX, §902(b), Oct. 15, 1970, 84 Stat. 947.

§2518. Procedure for interception of wire or oral communications

(1)Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information.

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any commu-

nication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8)(a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provi-

sions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and order shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application, and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communica-

tions, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trail, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trail, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trail, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make

available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thrity days after the date the order was entered and shall be diligently prosecuted.

Added Pub.L. 90-351, Title III, §802, June 19, 1968, 82 Stat. 218 and amended Pub.L. 91-358, Title II, §211(b), July 29, 1970, 84 Stat. 654.

§2519. Reports concerning intercepted wire or oral communications

(1) Within thirty days after the expiration of an order (or each extension thereof) entered under section 2518, or the denial of an order approving an interception, the issuing or denying judge shall report to the Administrative Office of the United States Courts—

(a) the fact that an order or extension was applied for;

(b) the kind of order or extension applied for;

(c) the fact that the order or extension was granted as applied for, was modified, or was denied;

(d) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

(e) the offense specified in the order or application, or extension of an order;

(f) the identity of the applying investigative or law

enforcement officer and agency making the application and the person authorizing the application; and

(g) the nature of the facilities from which or the place where communications were to be intercepted.

(2) In January of each year the Attorney General, an Assistant Attorney General specially designated by the Attorney General, or the principal prosecuting attorney of a State, or the principal prosecuting attorney for any political subdivision of a State, shall report to the Administrative Office of the United States Courts—

(a) the information required by paragraphs (a) through (g) of subsection (1) of this section will respect to each application for an order or extension made during the preceding calendar year;

(b) a general description of the interceptions made under such order or extension, including (i) the approximate nature and frequency of incriminating communications intercepted, (ii) the approximate nature and frequency of other communications intercepted, (iii) the approximate number of persons whose communications were intercepted, and (iv) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;

(c) the number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made;

(d) the number of trials resulting from such interceptions;

(e) the number of motions to suppress made with respect to such interceptions, and the number granted or denied;

(f) the number of convictions resulting from such interceptions and the offenses for which the convictions were obtained and a general assessment of the impor-

tance of the interceptions; and

(g) the information required by paragraphs (b) through (f) of this subsection with respect to orders or extensions obtained in a preceding calendar year.

(3) In April of each year the Director of the Administrative Office of the United States Courts shall transmit to the Congress a full and complete report concerning the number of applications for orders authorizing or approving the interception of wire or oral communications and the number of orders and extensions granted or denied during the preceding calendar year. Such report shall include a summary and analysis of the data required to be filed with the Administrative Office by subsections (1) and (2) of this section. The Director of the Administrative Office of the United States Courts is authorized to issue binding regulations dealing with the content and form of the reports required to be filed by subsections (1) and (2) of this section.
Added Pub.L. 90-351, Title III, §802, June 19, 1968, 82 Stat. 222.

§2520. Recovery of civil damages authorized

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

Added Pub.L. 90-351, Title III, §802, June 19, 1968, 82 Stat. 223, and amended Pub.L. 91-358, Title II, §211(c), July 29, 1970, 84 Stat. 654.